
BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of Supra Telecommunications & Information Systems against BellSouth Telecommunications, Inc. for violation of the Telecommunications Act of 1996; petition for resolution of disputes as to implementation and interpretation of interconnection, resale and collocation agreements; and petition for emergency relief.	DOCKET NO. 980119-TP ORDER NO. PSC-98-1467-FOF-TP ISSUED: October 28, 1998

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON JOE GARCIA E. LEON JACOBS, JR.

- FINAL ORDER ON MOTIONS FOR RECONSIDERATION,
- MOTION TO DISMISS, AND MOTION TO STRIKE

BY THE COMMISSION:

CASE BACKGROUND

On January 23, 1998, Supra Telecommunications & Information Systems (Supra) filed a Complaint against BellSouth Telecommunications, Inc. (BellSouth) for alleged violations of the Telecommunications Act of 1996 (Act) and Petition for resolution of certain disputes between BellSouth and Supra regarding interpretation of the Interconnection, Resale, and Collocation Agreements between Supra and BellSouth (Petition). On February 16, 1998, BellSouth filed its Answer and Response to Supra's Petition. On April 30, 1998, we held an administrative hearing on Supra's complaint. By Order No. PSC-98-1001-FOF-TP,

issued July 22, 1998, we rendered our final determination regarding the complaint.

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On August 6, 1998, BellSouth filed a Motion for Reconsideration and Clarification of Order No. PSC-98-1001-FOF-TP. That same day, Supra filed a Motion for Reconsideration and Clarification, as well as a Motion to Take Official Notice of the Record in Docket No. 960786-TL. On August 17, 1998, BellSouth filed its Response to Supra's Motion for Reconsideration and Clarification of Order No. PSC-98-1001-FOF-TL. BellSouth also filed its Opposition to Supra's Motion to Take Official Recognition of the Record in Docket No. 960786-TL. On August 18, 1998, Supra filed its Response to BellSouth's Motion for Reconsideration and Clarification, as well as a Request for Oral Argument. On August 21, 1998, BellSouth filed its Opposition to Supra's Request for Oral Argument.

On September 2, 1998, Supra filed a Motion to Dismiss BellSouth's Motion for Reconsideration and Clarification of Order No. PSC-98-1001-FOF-TP and a Motion to Strike BellSouth's Answer in Docket No. 980800-TP for Misconduct. Supra also requested oral argument on its motion. On September 9, 1998, BellSouth filed its Opposition to Supra's Motion to Dismiss and Motion to Strike and its own Motion to Strike and Motion for Oral Argument. BellSouth also included a Motion for Sanctions in its filing. On September 21, 1998, Supra filed its Response to BellSouth's Motion to Strike Supra's Motion to Dismiss and Motion for Sanctions. Supra also included a request to accept its response out of time. On September 23, 1998, BellSouth filed its Opposition to Supra's request.

Supra's Motion to Dismiss and Motion to Strike and BellSouth's Opposition are only addressed in this Order to the extent that they apply to Docket No. 980119-TP. To the extent that they apply to Docket No. 980800-TP, we have addressed them by a separate Order. Our determination on these post-hearing motions is set forth below.

MOTIONS

I. REQUESTS FOR ORAL ARGUMENT

Supra and BellSouth filed their requests for oral argument on the Motions to Strike in accordance with Rule 25-22.058, *Florida Administrative Code*. Due to the nature of Supra's and BellSouth's Motions to Strike, we granted the ORDER NO. PSC-98-1467-FOF-TP DOCKET NO. 980119-TP PAGE 4 requests for oral argument and limited it to five minutes per side.

Supra also asked that we hear oral argument on its Motion for Reconsideration and Clarification of Order No. PSC-98-1001-FOF-TP and upon its Response to BellSouth's Motion for Reconsideration and Clarification. Supra asserted that oral argument was necessary because the issues presented in the Motions for Reconsideration were complex. Thus, Supra stated that oral argument would assist us in making our determination on this matter.

BellSouth asked that Supra's request for oral argument be denied. BellSouth noted that Supra's Response to BellSouth's Motion for Reconsideration and Clarification was not timely filed, as acknowledged by Supra in its Response. BellSouth stated that it does not object to the late-filed pleading. BellSouth argued, however, that Supra's Request for Oral Argument was not timely, in accordance with Rule 25-22.058, *Florida Administrative Code*. Pursuant to that Rule, a request for oral argument must be submitted at the same time as the pleading upon which oral argument is requested. BellSouth argued that Supra did not submit its request at the time that Supra filed its Motion for Reconsideration and Clarification.

Furthermore, BellSouth argued that although Supra did submit its request at the time that Supra filed its Response to BellSouth's Motion, the Response was late. BellSouth argued, therefore, that the request was not timely as applied to either Supra's Motion for Reconsideration and Clarification or to Supra's Response to BellSouth's Motion for Reconsideration and Clarification. In addition, BellSouth argued that Supra failed to state with particularity how oral argument would assist us in our decision, as required by Rule 25-22.058, *Florida Administrative Code*. BellSouth argued that Supra's indications that the issues are complex is not sufficient to meet the requirements of Rule 25-22.058, *Florida Administrative Code*.

We agree that Supra's Request for Oral Argument was not timely filed as it applies to Supra's Motion for Reconsideration and Clarification. Furthermore, we do not believe that oral argument will assist us in making our decision, and Supra has not adequately indicated how it will, in accordance with Rule 25-22.058, *Florida Administrative Code*. Supra has merely indicated that the issues are not simple and that the motions demonstrate conflict in our Order. Supra did not state how oral argument will further illuminate the issues. For these ORDER NO. PSC-98-1467-FOF-TP DOCKET NO. 980119-TP PAGE 5 reasons, Supra's Request for Oral Argument on its Motion for Reconsideration and its Response to BellSouth's Motion for Reconsideration is denied.

II. SUPRA'S FIRST REQUEST TO ACCEPT RESPONSE OUT OF TIME

In its Response to BellSouth's Motion for Reconsideration and Clarification, Supra stated that it failed to timely file its Response because it erroneously assumed the Motion had been served by U.S. Mail. Supra believed, therefore, that it had 12 days to file its Response. The Motion had, however, been served by hand delivery. As such, Supra's Response was five days late. When the error was detected, Supra served its Response by hand delivery. Supra asked, therefore, that we accept its late-filed Response.

In its Opposition to Supra's Request for Oral Argument, BellSouth indicated that it did not object to Supra's late-filed Response.

It appears that Supra's error was inadvertent and that it has not caused any undue prejudice to BellSouth. Thus, we have accepted and considered Supra's late-filed Response to BellSouth's Motion for Reconsideration and Clarification.

III. SUPRA'S SECOND MOTION TO FILE RESPONSE OUT OF TIME

Supra stated that BellSouth's Motion to Strike Supra's Motion to Dismiss was served by hand delivery on September 10, 1998. Therefore, Supra's Response was due September 17, 1998. Supra's Response was four days late. Supra stated that it was unable to timely file its response due to activities and deadlines in this docket and Docket No. 980800-TP. Supra asked, therefore, that we accept its late-filed Response.

In its response, BellSouth stated that a busy schedule does not excuse an untimely filing. BellSouth noted that Supra could have sought an extension of time to file its response before the filing deadline, but did not. BellSouth asked, therefore, that we deny Supra the right to file its response out of time.

We are aware that there have been numerous activities in this docket and Docket No. 980800-TP. This is, however, Supra's second, post-hearing request to accept a response out of time. ORDER NO. PSC-98-1467-FOF-TP DOCKET NO. 980119-TP PAGE 6 The response deadlines set forth in Rule 25-22.037(2), *Florida Administrative Code*, are clear. The purpose of the rule is to ensure that pleadings and responses are filed in a timely manner and that no party is unduly burdened or inappropriately benefitted by the timing of pleadings and motions. These rules are equally applicable to the parties in this

case. Supra's request is, therefore, denied.

IV. SUPRA'S MOTION TO DISMISS AND BELLSOUTH'S MOTION TO STRIKE

SUPRA

Supra asked that we dismiss BellSouth's Motion for Reconsideration of Order No. PSC-98-1001-FOF-TP for misconduct in this proceeding. Supra alleged that BellSouth engaged in misconduct by offering a Commission staff person that had been involved in this Docket a position with BellSouth. Supra stated that the staff person was lead on this docket, as well as Docket No. 980800-TP. Because she was offered a position with BellSouth, and has now accepted that position, Supra complained that she can no longer participate in resolving this case. Supra asserted that the staff person was the key, senior staff person in formulating the staff's post-hearing recommendation in this Docket, and that she would have been the staff person to develop the recommendation regarding the Motions for Reconsideration of Order No. PSC-98-1001-FOF-TP.

Supra asserted that our decision on the Motions for Reconsideration of Order No. PSC-98-1001-FOF-TP has great import for BellSouth. Specifically, Supra asserted that requiring BellSouth to provide online edit checking to Supra could ". . . cost BellSouth a great deal of money and cause BellSouth a good deal of trouble." September 2, 1998, Motion to Dismiss at p. 3. Supra argued that in view of the importance of this case, BellSouth's actions in offering the staff person a position are clearly improper. Supra complained that BellSouth has the resources to hire anyone. Supra added that it ". . . is not an accident that this staff person was offered a position by BellSouth at this point in time." September 2, 1998, Motion to Dismiss at p. 4. Supra charged that BellSouth offered the staff person a position in order to avoid the staff person's further involvement in this docket and in Docket No. 980800-TP. Supra argued that the staff person has demonstrated her knowledge, experience, and ". . .willingness to challenge BellSouth. . .," therefore, BellSouth would prefer to have her removed from these ORDER NO. PSC-98-1467-FOF-TP DOCKET NO. 980119-TP PAGE 7 cases so that less experienced staff members will be required to complete these cases. September 2, 1998, Motion to Dismiss at p. 5. Supra stated that no other Commission staff member is able to handle these cases as capably as the staff person hired by BellSouth. Thus, Supra argued it is a violation of due process for BellSouth to offer the staff person a position with BellSouth.

Supra further asserted that this is "misconduct of the highest order. . .," which has deprived Supra of its right to a fair hearing. Supra argued that this is analogous to jury tampering. Supra added that, according to Rule 1.540, Florida Rules of Civil Procedure, BellSouth's actions are a sufficient basis for the Commission to dismiss BellSouth's Motion for Reconsideration of Order No. PSC-98-1001-FOF-TP. Rule 1.540, Florida Rules of Procedure, states, in part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, decree, order, or proceeding for t h e f o l l o w i n g reasons:
>
> (3) fraud (whether heretofore denominated intrinsic of extrinsic), misrepresentation, or other misconduct of an a d v e r s e party;

Supra stated that BellSouth's action is ". . . premeditated, targeted, and abusive of the process." September 2, 1998, Motion to Dismiss at p. 14. Supra asked, therefore, that we dismiss BellSouth's Motion for Reconsideration and Clarification.

BELLSOUTH

In its Opposition and Motion to Strike, BellSouth asserted that Supra's allegations are without merit

In its Opposition and Motion to Strike, BellSouth asserted that Supra's allegations are without merit. BellSouth stated that its offer of employment to the staff person is permissible under Section 112.313(9)(a)(6)(c), ORDER NO. PSC-98-1467-FOF-TP DOCKET NO. 980119-TP PAGE 8 *Florida Statutes*. In accordance with that Section, the restrictions on employment set forth in Section 112.313, *Florida Statutes*, do not apply to a person employed by the agency prior to December 31, 1994. BellSouth also attached the affidavit of Nancy Sims to its Opposition and Motion to Strike. The affidavit stated that BellSouth did not offer the staff person a position in order to avoid her participation in these dockets or to influence the outcome of the dockets. BellSouth states that it had no "sinister" motive in hiring the staff person. BellSouth also asserted that the Commission staff is capable of handling these dockets without the staff person's participation and assistance. BellSouth added that Supra has offered no evidence to substantiate its claims that BellSouth's misconduct was premeditated.

BellSouth stated that Supra knew that BellSouth's conduct was lawful.[1] BellSouth argued, therefore, that Supra's Motion should be denied as a sham pleading pursuant to Rule 1.150, Florida Rules of Civil Procedure.[2] BellSouth added that Supra's Motion contains "scandalous" matters, that should be stricken in accordance with Rule 1.140, Florida Rules of Civil Procedure. BellSouth stated that scandalous matters are accusations against another party that are unnecessary and accusatory. BellSouth argued that such things include allegations that reflect upon one's moral character or that detract from the dignity of the court.[3]

[1] Citing Supra s Motion at ¶ 22, where Supra notes that the employment restrictions in Section 112.313, Florida Statutes, do not apply to the staff person hired by BellSouth, in accordance with Section 112.313(9)(a)(6)(c), Florida Statutes. [2]Citing Menke v. Southland Specialities Corp., 637 So. 2d 285 (Fla. 2nd DCA 1994). [3]Citing Burke v. Mesta Machinery Co., 5 F.R.D. 134 (Pa. 1946) and Martin V. Hunt, 28 F.R.D. 35 (D.C. Mass. 1961). BellSouth also cites Ropes v. Stewart, 45 So. 31 (Fla. 1907), wherein the Court granted a motion to strike scandalous allegations that the defendant had used perjury and evil influence on the judge and jury. ORDER NO. PSC-98-1467-FOF-TP DOCKET NO. 980119-TP PAGE 9 Determination

Upon consideration, we view Supra's Motion to Dismiss BellSouth's Motion for Reconsideration for Misconduct as a sham pleading.

Ms. Sims stated in her affidavit that BellSouth offered the staff person a position after Order No. PSC-98-1001-FOF-TP was issued, and before any Motions for Reconsideration of the Order were filed. At the time of BellSouth's offer, the staff person had already completed her participation in developing the staff recommendation regarding Docket No. 980119-TP and presenting the post-hearing recommendation for our consideration. Thus, BellSouth's offer could not have impaired our staff's evaluation of this case.

As for Supra's assertions that the staff person would have been the key staff person involved in evaluating the pending Motions for Reconsideration and in drafting the staff recommendation on these motions, we note that our legal staff generally has the primary role in evaluating Motions for Reconsideration of the Commission's final orders based upon the legal standard for such motions, and in drafting the staff recommendations regarding such motions. It is also noteworthy that the main point upon which BellSouth has sought reconsideration is online edit checking. The staff person hired by BellSouth was not the staff person that drafted our staff's original recommendation on this issue, although she was that staff member's supervisor. While the staff person's knowledge and experience were valuable assets to us, we are confident that the staff member responsible for addressing online edit checking provided very competent assistance to our legal staff in reviewing this point for purposes of making the staff's recommendation to us on BellSouth's Motion for Reconsideration, which is addressed herein.

Based on the facts as known by us and as set forth in Ms. Sims's uncontroverted affidavit, we believe that Supra's Motion is factually false and may be considered a sham pleading in accordance with Rule 1.150,

Florida Rules of Civil Procedure.

We also believe that Supra's Motion may be considered a frivolous pleading in accordance with Section 120.57 (1)(b)(5), *Florida Statutes*, because there is no legal basis or justification for the motion. In past cases, ORDER NO. PSC-98-1467-FOF-TP DOCKET NO. 980119-TP PAGE 10 we have stated that "In determining whether a motion is improper pursuant to Section 120.57(1)(b)(5), *Florida Statutes*, we must solely focus on whether there was some legal justification for its filing." Order No. PSC-96-1320-FOF-WS, issued October 30, 1996, in Docket No. 950495, at p. 21. Supra has stated in its own Motion that the agency employment restrictions set forth in Section 112.313, *Florida Statutes*, are not applicable to the staff person hired by BellSouth. Supra's only other asserted legal basis for its Motion is Rule 1.540, Florida Rules of Civil Procedure, regarding dismissal for fraud or misconduct. Supra does not allege fraud, but alleges that BellSouth has engaged in misconduct. Misconduct is defined by Black's Law Dictionary as

> A transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behavior, willful in character, improper or wrong behavior . . .

Black's Law Dictionary, 6th Ed. (1990). Supra has not identified any rule or law which BellSouth broke when it offered the staff person a position, nor has Supra provided any factual or legal support for its assertions that BellSouth hired the staff person in an attempt to improperly influence the outcome of these two dockets. Also, Rule 1.540, Florida Rules of Civil Procedure, is applicable in this instance. Supra asks that we dismiss BellSouth's Motion for Reconsideration. Supra is not seeking relief from a judgment, decree or order. We find no basis in law or in fact for Supra's Motion. Thus, we shall consider Supra's Motion to Dismiss a frivolous motion. For these reasons, we hereby grant BellSouth's Motion to Strike Supra's Motion to Dismiss for Misconduct.

V. REQUEST FOR SANCTIONS

BELLSOUTH

ORDER NO. PSC-98-1467-FOF-TP DOCKET NO. 980119-TP PAGE 11 BellSouth asked that sanctions be imposed upon Supra for filing the Motion to Strike for Misconduct. BellSouth argued that administrative proceedings are no place for improper or frivolous pleadings, as set forth in Section 120. 57(1)(b)(5), *Florida Statutes*. BellSouth argued that Supra's Motion qualifies as an improper and frivolous pleading. BellSouth further argued that the only purpose for Supra's Motion is to "throw mud," delay the case, and harass BellSouth. September 9, 1998, Opposition and Motion to Strike at p. 5. According to BellSouth, there is no legal basis for Supra's Motion. Thus, BellSouth asked that we impose reasonable sanctions on Supra, including the imposition of attorneys' fees and costs.[4]

As noted above, we did not accept Supra's late-filed response to BellSouth's Motion.

As we have indicated herein, Supra's Motion to Dismiss shall be considered a frivolous pleading in accordance with Section 120.57(1)(b)(5), *Florida Statutes*. There is no legal basis or justification for Supra's motion.

In Order No. PSC-96-1320-FOF-WS, we relied on Mercedes Lighting and Elec. Supply, Inc. v. State, Dep't of General Services, 567 So. 2d 272, 278 (Fla. 1st DCA 1990) in rendering its decision on a request for attorney's fees and costs. We noted that in Mercedes Lighting, the court stated:

> The rule [against frivolous or improper pleadings contained in Rule 11, Federal Rules of Civil Procedure] is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or

> legal theories." The court further noted, that "a claim or defense so meritless as to warrant sanctions, should have been susceptible to summary disposition.

[4]Citing Order No. PSC-96-1320-FOF-WS, issued October 30, 1996, in Docket No. 950495-WS, wherein the Commission stated that it has the authority to impose sanctions pursuant to Section 120.57(1)(b), Florida Statutes. ORDER NO. PSC-98-1467-FOF-TP DOCKET NO. 980119-TP PAGE 12 Order No. PSC-96-1320-FOF-WS at p. 21, citing Mercedes Lighting, 567 So. 2d at 276. We further considered the court's holding that improper purpose in a pleading "may be manifested by excessive persistence in pursuing a claim or defense in the face of repeated adverse rulings, or by obdurate resistance out of proportion to the amounts or issues at stake." Id. at 278. We added that ". . . it is important to consider what was reasonable at the time the pleading was filed." Order No. PSC-96-1320-FOF-WS at p. 20. We also stated that there must be some legal justification for the filing in question. Id. at p. 21.

Supra has stated in its Motion to Strike that the agency employment restrictions set forth in Section 112.313, *Florida Statutes*, are not applicable to the staff person hired by BellSouth. As set forth in this Order, Supra's only other asserted legal basis for its Motion is Rule 1.540, Florida Rules of Civil Procedure, regarding relief from a decree or order based upon fraud or misconduct. Misconduct is, however, defined as

> A transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behavior, willful in character, improper or wrong b e h a v i o r . . .

Black's Law Dictionary, 6th Ed. (1990). Supra has not identified any rule or law that BellSouth violated when it offered the staff person employment. Therefore, we find that there is not any legal basis for Supra's Motion. Even if one considers that the proceedings in Docket No. 980800-TP have been quite contentious between the parties and that the end results of this case may be quite significant for both parties, we do not believe that this pleading can be considered reasonable under the circumstances. We shall, therefore, consider Supra's Motion to Strike to be a frivolous motion.

While we find that Supra's Motion to Strike is frivolous, we acknowledge that sanctions should only be imposed when truly ORDER NO. PSC-98-1467-FOF-TP DOCKET NO. 980119-TP PAGE 13 warranted, in order to avoid ". . .chill[ing] an attorney's enthusiasm or creativity in pursuing factual or legal theories." Order No. PSC-96-1320-FOF-WS at p. 21, citing Mercedes Lighting, 567 So. 2d at 276. We emphasize that further pursuit by Supra of such legally and factually deficient theories shall not be considered lightly. Nevertheless, we shall not grant BellSouth's request for sanctions for Supra's filing of the Motion to Strike for Misconduct.

VI. BELLSOUTH'S MOTION FOR RECONSIDERATION AND CLARIFICATION

STANDARD OF REVIEW

The proper standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which we failed to consider in rendering our Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex. rel. Jaytex Realty Co. V. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

BELLSOUTH

BellSouth asked that we reconsider our decision to require BellSouth to provide Supra with the same online edit checking capability that BellSouth's retail ordering systems provide. BellSouth argued that we went beyond the evidence and the testimony in reaching our decision. BellSouth stated that our decision was arbitrary and ignored evidence that contradicts our decision.[5] In addition, BellSouth stated that we should clarify certain requirements set forth in Order No. PSC-98-1001-FOF-TL.

[5] Caranci v. Miami Glass & Engineering Co., 99 So. 2d 252, 254 (Fla. 3rd DCA 1957). ORDER NO. PSC-98-1467-FOF-TP DOCKET NO. 980119-TP PAGE 14 Specifically, BellSouth argued that online edit checking capability was never an issue in this case. BellSouth acknowledged that electronic access to Operations Support Systems (OSS) was an issue, but argued that the issue of electronic access to OSS did not include online edit checking. BellSouth asserted that Supra did not raise the issue of online edit checking in its complaint or in its testimony. BellSouth noted that Supra's witness Ramos never mentioned online edit checking; rather, witness Ramos asked that Supra be provided with the exact same systems as BellSouth. BellSouth argued that Supra's only complaint about edits was that EDI and LENS orders that contain errors go to the LCSC for handling. BellSouth emphasized that we determined at page 23 of the Order that BellSouth was not required to provide the exact same systems to Supra. We also found that BellSouth had provided all of the interfaces required by the agreement between the parties. See Order at page 23. Furthermore, we found that BellSouth had added the capability to allow ALECs to electronically supplement and correct orders in both LENS and EDI. See Order at page 22. BellSouth argued that by making a further determination that BellSouth must provide online edit checking capability, the Commission improperly went beyond the issues and the evidence.

In addition, BellSouth argued that if it is required to provide the same edit checking capability that its retail systems provide, it will have to install computer hardware and software on Supra's premises. BellSouth asserted that this would require a substantial amount of time and money. BellSouth stated that it would have to duplicate its Regional Navigation System (RNS) and its Direct Order Entry system (DOE) for Supra at Supra's premises. BellSouth argued that this goes beyond the requirements of the Act and the FCC's Interconnection Order. BellSouth noted that it has provided ALECS with the specifications to build their own systems. BellSouth further argued that if it had known this was an issue, it would have provided testimony on it. Thus, BellSouth argued that we erred in making a decision on this point.

BellSouth also sought clarification of certain requirements in the Order. We required BellSouth to provide Supra with any outstanding documentation requested by Supra. With regard to database documentation, BellSouth stated that it believes it has provided everything requested, but asks us to identify what other documentation may be required, if any. BellSouth also sought clarification of the requirement to provide Supra with PLATS. BellSouth stated that PLATS is the cable layout and engineering ORDER NO. PSC-98-1467-FOF-TP DOCKET NO. 980119-TP PAGE 15 records of BellSouth. BellSouth asserted that these records are voluminous and proprietary. BellSouth stated that providing these records goes beyond the requirements of the Act. BellSouth asked, therefore, that we clarify that BellSouth needs to provide access to these records only on a request basis when access is necessary. BellSouth stated that it would provide access in a reasonable amount of time.

SUPRA

Supra argued that Supra's inability to perform online edit checking was addressed on several occasions, including in the depositions of BellSouth's employees. Supra argued that witness Ramos's statement that Supra needs the exact same systems as those maintained by BellSouth demonstrates that the OSS provided to Supra was not adequate, and that the lack of online edit checking contributed to that inadequacy.

Supra asserted that BellSouth failed to present adequate evidence on this issue and is now trying to argue that online edit checking was not an issue, because BellSouth does not like our determination. Supra argued that we should not reconsider our decision on this issue simply because BellSouth does not like the outcome.

We note that Supra did not respond to BellSouth's request for clarification regarding the provision of PLATS.

Determination

Upon consideration, we find that BellSouth has not identified any facts that we overlooked, or any point of law upon which we made an error in requiring BellSouth to provide Supra with online edit checking capability. Supra's inability to check its orders for errors so that corrections can be made in a timely manner was addressed by Supra's witness Hamilton, and considered by us at pages 21-22 of Order No. PSC-98-1001-FOF-TP. As set forth at page 21:

> The witness [Hamilton] stated that if an error is made by its customer service representative, Supra will not learn of this error until BellSouth processes the ORDER NO. PSC-98-1467-FOF-TP DOCKET NO. 980119-TP PAGE 16 order. Witness Hamilton asserted that in such a case, BellSouth will send Supra a clarification form, which states that an error has been made and that a corrected o r d e r m u s t b e resubmitted. Witness Hamilton also asserted that the correction must be handled manually, because it is an update to an existing order. This, he argued, makes it impossible for Supra to provide reliable, timely service to its customers.

At page 22, we found that

> We do, however, note that Supra contended that BellSouth's ALEC ordering systems do not provide the same online edit checking capability that BellSouth's retail ordering systems provide. We believe the same interaction and edit checking capability must take place when an ALEC is working an order as when BellSouth's retail ordering systems interact with BellSouth's FUEL and Solar databases to check the accuracy of B e l l S o u t h ' s orders.

Although we determined that BellSouth had adequately addressed Supra's concerns regarding supplementing orders electronically, ORDER NO. PSC-98-1467-FOF-TP DOCKET NO. 980119-TP PAGE 17 we found that BellSouth must also provide the same edit checking capability in order to comply with the terms of the agreement.

In addition, we find that edit checking capability clearly falls within Issue 1 (d), which was identified by the prehearing officer in Order No. PSC-98-0416-PCO-TP, issued March 24, 1998, as an issue to be addressed at the hearing. This issue states:

> Issue 1: Has BellSouth Telecommunicati ons, Inc., failed to p r o p e r l y implement the following provisions of its Resale, Collocation, a n d Interconnection Agreements with Supra such that Supra is to provide local e x c h a n g e service on parity with that which BellSouth provides: (d) Electronic access to Operational Support Systems (OSS) and OSS interfaces (Ordering and Provisioning, Installation, Maintenance and Repair)
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> ORDER NO. PSC-98-1467-FOF-TP DOCKET NO. 980119-TP PAGE 18 Furthermore, BellSouth's witness Stacy addressed the ALECs' ability to process an order, including how errors are handled, in his testimony. See Transcript pages 578 and 573. This testimony was

considered and addressed by us at pages 21-22 of the Order. Based upon the testimony already considered by us, it is clear that BellSouth's online edit checking capability results in a disparity in how errors are handled and orders are processed.

For these reasons, we hereby deny BellSouth's Motion for Reconsideration. In view of BellSouth's assertions that it would be necessary to place equipment at Supra's premises, we shall, however, clarify that BellSouth does not need to provide the exact same interfaces that it uses. As set forth in our order, BellSouth's FUEL and Solar databases have simultaneous interaction with BellSouth's ordering interfaces, so that errors in an order being worked by a service representative are immediately identified. If an error is identified, the BellSouth service representative can make corrections before the order is completed. BellSouth shall provide Supra with this same capability through the ordering interfaces provided to it, as identified in the parties' agreement.

BellSouth has also asked that we clarify the requirement to provide PLATS to Supra. BellSouth has indicated that PLATS contains proprietary information and is quite voluminous. BellSouth asks, therefore, that it be allowed to provide this information on a per request basis, as needed. We note that in Order No. PSC-98-1001-FOF-TP, at page 35, we found that Supra had not supported its claims that it had requested this information from BellSouth. In view of this finding, and BellSouth's assertions that the material is proprietary and voluminous, we hereby clarify Order No. PSC-98-1001-FOF-TP to reflect that BellSouth shall provide PLATS to Supra on a per request basis, and may do so subject to a protective agreement between the parties, if necessary.

VII. MOTION TO TAKE OFFICIAL NOTICE OF RECORD IN DOCKET NO. 980786-TL

SUPRA

Supra asked that we take official notice of the
record of Docket No. 960786-TL, Consideration of BellSouth Telecommunications, Inc.'s Entry into InterLATA Services pursuant to Section 271 of the Federal Telecommunications Act of 1996. Supra argued that this is necessary because BellSouth's witness ORDER NO. PSC-98-1467-FOF-TP DOCKET NO. 980119-TP PAGE 19 Stacy presented evidence at the April 30, 1998, hearing in this Docket that is contradicted by evidence presented in Docket No. 960786-TL. Supra asserted that BellSouth's witness Stacy testified at the April 30, 1998, hearing that AT&T did not have any serious problems with EDI. Citing Transcript at p. 574. Supra alleged, however, that AT&T's witness Bradbury presented testimony in Docket No. 960786-TL that AT&T had extensive problems with EDI and LENS and that neither was an adequate interface with BellSouth's OSS. Supra noted that we took official notice of our final order in Docket No. 960786-TL in this proceeding. Supra stated that it is appropriate for us to also recognize the record upon which that Order was based.

In addition, Supra asserted that it was previously unaware of witness Bradbury's testimony in Docket No. 960786-TL. Supra stated that due to the number of proceedings before this Commission in which interconnection issues have been addressed, it was not possible for Supra to identify this testimony before now. Now that this information has been discovered, Supra argued that we should take official notice of it, because it is sworn testimony, which BellSouth had the opportunity to rebut during the proceedings in Docket No. 960786-TL.

BELLSOUTH

In response, BellSouth argued that Supra's request is inappropriate and untimely. BellSouth also argued that it is only proper to take official notice when other parties have been given the opportunity to address the propriety of the official notice and of the nature of the matter noticed, in accordance with Section 90.204(1), Florida Rules of Evidence. BellSouth further argued that a party must demonstrate good cause for not having given timely notice of its request to take official notice. BellSouth argued that Supra's assertions that it was impossible to be aware of the relevance of prior testimony in other dockets does not amount to good cause.

In addition, BellSouth argued that Supra is incorrect in its assertion that witness Stacy's testimony in this docket is contradicted by evidence in Docket No. 960786-TL. BellSouth incorporated its argument in its Response to Supra's Motion for Reconsideration and Clarification, and stated that AT&T witness Bradbury testified in Docket No. 960786-TL regarding whether the EDI interface meets the criteria of Section 271 of the Act. Witness Bradbury indicated that AT&T was testing the EDI interface in Georgia, but was not using it commercially. ORDER NO. PSC-98-1467-FOF-TP DOCKET NO. 980119-TP PAGE 20 BellSouth argued that witness Stacy testified that there were no operational problems placing orders using EDI. BellSouth stated that it does not dispute that AT&T alleged that the EDI interface did not meet the Section 271 requirements. BellSouth argued, however, that the testimony in Docket No. 960786-TL does not contradict witness Stacy's testimony, because witnesses Stacy and Bradbury did not address the same issue. BellSouth added that witness Bradbury's testimony was offered over a year ago, and that many changes and modifications have been made to BellSouth's OSSs since that time.

Determination

Upon consideration, Supra's Motion to Take Official Notice shall be denied. The testimony that Supra asks us to accept is clearly intended to be submitted for purposes of impeachment. Supra has submitted its request after our hearing and after we have rendered our post-hearing decision in this docket. It would not be proper to take official recognition of this testimony without giving BellSouth an opportunity to examine and contest the material, as required by Section 120.569(2)(g), *Florida Statutes*. See Citizens of State of Florida v. Florida Public Service Commission, 383 So. 2d 901 (Fla. 1980)(finding that Section 120.61, *Florida Administrative Code, renumbered as Section 120.569(2)(g), Florida Administrative Code,* guarantees parties notice and opportunity to contest material before the Commission relies upon it).[6]

BellSouth's response and opposition to Supra's request is not the same as an opportunity to examine and contest the material that Supra asks us to recognize. See Citizens of State of Florida v. Florida Public Service Commission, 383 So. 2d 901 (Fla. 1980)(opposition to motions was not 'opportunity to examine and contest the material' under Section 120.61, *Florida Statutes*). Furthermore, BellSouth's prior opportunity to cross-examine witness Bradbury in proceedings conducted over a year ago is not a basis for [6] See also Florida Gas Co. v. Hawkins, 372 So. 2d 1118(Fla. 1979)(quashing Commission order apparently based upon presumption that circumstances in existence in previous case were still applicable.) ORDER NO. PSC-98-1467-FOF-TP DOCKET NO. 980119-TP PAGE 21 granting Supra's request. It is likely that circumstances have changed since the hearing in Docket No. 960786-TL, and, thus, the relevance of the testimony here is questionable. Also, the testimony offered by witness Bradbury in Docket No. 960786-TL was offered to address issues different than those addressed in this docket. As such, cross-examination of the witness in the prior docket may not be adequate or comparable to cross-examination in this docket. For these

reasons, we hereby deny Supra's request.

VIII. SUPRA'S MOTION FOR RECONSIDERATION

STANDARD OF REVIEW

As previously set forth, the proper standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which we overlooked or which we failed to consider in rendering our Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex. rel. Jaytex Realty Co. V. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

SUPRA

Supra argued that we should reconsider and clarify our decision that BellSouth has provided Supra with adequate access to BellSouth's OSS systems. Supra asserted that there is ample evidence in the record that faxing orders to BellSouth causes problems for ALECs, and that ALECs only do so because BellSouth has not provided a viable alternative. Supra asserted that we have overlooked this evidence, much of which, Supra alleged, comes from BellSouth's own witnesses.

Supra alleged that BellSouth's witness Stacy explained how BellSouth employees take orders for new service and provide telephone numbers to customers in the same conversation. Supra stated that this capability comes from BellSouth's RNS systems. ORDER NO. PSC-98-1467-FOF-TP DOCKET NO. 980119-TP PAGE 22 **Supra contrasted this capability with the capability provided by the interfaces BellSouth offers to ALECs. Supra asserted that none of the interfaces offered to ALECs allow the ALECs to electronically access and check new orders. Referring to the depositions of BellSouth employees Stephanie Hurt and Teresa Gentry, Supra stated that there is extensive manual intervention in the ALEC's ordering process, which causes delays and an increase in errors.**

Supra also argued that BellSouth's LCSC employees can check the accuracy of orders easily and with minimal training. Supra alleged that ALECs do not have this same capability, which causes significant delays in processing orders for ALECs. Supra argued that this is a serious competitive disadvantage.

Supra also referred to the testimony offered by AT&T's witness Bradbury in Docket No. 960786-TL, but we have not considered this testimony in view of our decision on Supra's Request to Take Official Notice.

In addition, Supra argued that we have overlooked our statements in Order No. PSC-97-1459-FOF-TL, issued in Docket No. 960786-TL. In that Order, we stated that BellSouth's interfaces and functions do not allow an ALEC to perform the same OSS

functions that BellSouth can. Supra argued that BellSouth is still not providing the same capabilities to ALECs that it provides to itself.

Finally, Supra stated that we directed BellSouth to take several specific actions by Order No. PSC-98-1001-FOF-TL. We ordered BellSouth to modify LENS to give Supra the same ordering capability that BellSouth's RNS system provides to BellSouth and to provide online edit checking capability. Supra asked that we clarify when and how BellSouth is to complete these requirements. Supra argued that clarification on this point will ensure that the requirements are met.

BELLSOUTH

BellSouth argued that Supra's Motion for Reconsideration and Clarification reargues matters fully addressed in the Commission's Order, and, therefore, should be denied. BellSouth stated that we addressed manually faxed orders at page 18 of Order No. PSC-98-1001-FOF-TL. There, we stated that the evidence did not support Supra's assertions. BellSouth also argued that Supra's assertion that there is no alternative to manually faxing ORDER NO. PSC-98-1467-FOF-TP DOCKET NO. 980119-TP PAGE 23 **orders is inaccurate, nor was it the issue addressed at hearing. BellSouth stated that the issue was whether BellSouth had made the interfaces specified in the parties' agreement available to Supra. BellSouth noted that we found that BellSouth had provided access to interfaces in accordance with the parties' agreement. See Order No. PSC-98-1001-FOF-TL at page 23. BellSouth further noted that whether the interfaces specified in the agreement are acceptable was also not an issue in this case. BellSouth stated that we should not ignore the agreement between the parties.**

In addition, BellSouth stated that it has outlined in its own Motion for Reconsideration and Clarification when and how it plans to meet the requirements of Order No. PSC-98-1001-FOF-TL. BellSouth added that we have continuing jurisdiction over our Order for enforcement purposes.

Determination

Having considered the arguments presented, we find that the arguments raised by Supra in its Motion for Reconsideration have been thoroughly addressed by us in Order No. PSC-98-1001-FOF-TL. At pages 17-19 of the Order, we addressed manual faxing of orders. We determined that there was not sufficient evidence to support Supra's assertions that BellSouth required Supra to manually fax all of its orders. We did, however, require BellSouth to modify LENS to allow Supra to have the same ordering capability that BellSouth's employees have through RNS. We addressed access to OSS at pages 22-23 of the Order. We determined that BellSouth is not required to provide the exact same interfaces that BellSouth uses for its retail operations. We further determined that BellSouth had made electronic interfaces available to Supra, in accordance with the parties' agreement. Supra has presented nothing new, nor has it demonstrated that we erred in our decision. Supra has simply reargued its case, which is improper. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex. rel. Jaytex Realty Co. V. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Therefore, we hereby deny Supra's Motion for Reconsideration.

Regarding Supra's request for clarification of when and how BellSouth must fulfill the requirements set forth in Order No. PSC-98-1001-FOF-TL, we agree that some

clarification is appropriate. In BellSouth's response to Supra's Motion for Reconsideration and Clarification, BellSouth referred to its own Motion for Reconsideration and Clarification. There, BellSouth indicated that it expects to have the modifications to LENS that ORDER NO. PSC-98-1467-FOF-TP DOCKET NO. 980119-TP PAGE 24 **were required by us to be completed by February, 1999. This appears reasonable, but we encourage BellSouth to complete the modifications by the end of 1998. As for the online edit checking capability, we again emphasize, as explained above, that we shall not require BellSouth to duplicate its RNS and DOE interfaces at Supra's premises. In accordance with Order No. PSC-98-1001-FOF-TL, BellSouth shall provide Supra with the same interaction and online edit checking capability through its interfaces that occurs when BellSouth's retail ordering interfaces interact with BellSouth's FUEL and Solar databases to check orders. Order No. PSC-98-1001-FOF-TL at pages 22 and 47. BellSouth shall be required to do so by December 31, 1998. If, however, BellSouth is able to sufficiently demonstrate that it is not possible to provide online edit checking by that date, BellSouth may file a Motion for Extension of Time for our consideration.**

Based on the foregoing, it is therefore

ORDERED by the Florida Public Service Commission that Supra Telecommunications & Information Systems' request that we consider its late-filed response to BellSouth Telecommunications, Inc.'s Motion for Reconsideration is granted. It is further

ORDERED that the Motion to File its Response to BellSouth Telecommunications, Inc.'s Motion to Strike filed by Supra Telecommunications & Information Systems is denied. It is further

ORDERED that the Motion to Strike filed by BellSouth Telecommunications, Inc. is granted. It is further

ORDERED that the request for sanctions filed by BellSouth Telecommunications, Inc. is denied. It is further

ORDERED that the Motion for Reconsideration filed by BellSouth Telecommunications, Inc. is denied. It is further

ORDERED that the Motion for Reconsideration filed by Supra Telecommunications & Information Systems is denied. It is further

ORDERED that the Motion to Take Official Notice of the Record in Docket No. 960786-TL filed by Supra Telecommunications & Information Systems is denied. It is further

ORDER NO. PSC-98-1467-FOF-TP DOCKET NO. 980119-TP PAGE 25 **ORDERED that Order No. PSC-98-1001-FOF-TP is clarified as set forth in the body of this Order. It is further**

ORDERED that Order No. PSC-98-1001-FOF-TP is reaffirmed in all other respects. It is further

ORDERED that this Docket shall be closed.

By ORDER of the Florida Public Service Commission this 28th day of October, 1998.

/s/ Blanca S. Bayó
BLANCA S. BAYÓ, Director

Division of Records and Reporting

This is a facsimile copy. A signed copy of the order may be obtained by calling 1-850-413-6770.

(S E A L)

BK

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 1 2 0 . 5 6 9 (1) , *Florida Statutes*, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 1 2 0 . 6 8 , *Florida Statutes*, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the ORDER NO. PSC-98-1467-FOF-TP DOCKET NO. 980119-TP PAGE 26 **decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, *Florida Administrative Code*; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.**

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA

BELLSOUTH TELECOMMUNICATIONS, INC.,

CASE NO. _____

Plaintiff,

vs.

SUPRA TELECOMMUNICATIONS & INFORMATION SYSTEMS, INC., THE FLORIDA PUBLIC SERVICE COMMISSION, THE HONORABLE J. TERRY DEASON, in his official capacity as a Commissioner of the Florida Public Service Commission, THE HONORABLE JOE GARCIA, in his official capacity as a Commissioner of the Florida Public Service Commission, and THE HONORABLE E. LEON JACOBS, in his official capacity as a Commissioner of the Florida Public Service Commission,

Defendants.
_____/

COMPLAINT

Nature of the Action

1. BellSouth Telecommunications, Inc. ("BellSouth") brings this action to seek review of a decision of the Florida Public Service Commission (the "PSC") under the federal Telecommunications Act of 1996 (the "1996 Act"). The PSC decision at issue requires BellSouth to provide Defendant Supra Telecommunications & Information Systems, Inc. ("Supra") with what is known as "on-line editing capability." The PSC's imposition of that

requirement is inconsistent with the 1996 Act, with the Federal Communications Commission (the "FCC") orders implementing the 1996 Act, and with BellSouth's agreements with Supra pursuant to the 1996 Act. It is also arbitrary and capricious, results from a failure to engage in reasoned decision-making, and is not supported by the record developed by the PSC. It should be declared unlawful, and all parties to this case should be enjoined from enforcing it against BellSouth.

Parties, Jurisdiction, and Venue

2. Plaintiff BellSouth is a Georgia corporation with its principal place of business in Georgia. BellSouth provides local telephone service throughout much of the State of Florida.

3. Defendant Supra is a Florida corporation with its principal place of business in Miami, Dade County, Florida. Supra also provides local telephone service in Florida. Supra may be served through its registered agent, Olukayode Ramos, at 2620 S.W. 27th Avenue, Miami, Florida 33133.

4. Defendant PSC is an agency of the State of Florida. The PSC is a "State Commission" within the meaning of 47 U.S.C. §§ 153(41), 251 and 252.

5. Defendant Terry Deason is a Commissioner of the PSC. Commissioner Deason is sued in his official capacity for declaratory and injunctive relief only.

6. Defendant Joe Garcia is a Commissioner of the PSC. Commissioner Garcia is sued in his official capacity for declaratory and injunctive relief only.

7. Defendant E. Leon Jacobs is a Commissioner of the PSC. Commissioner Jacobs is sued in his official capacity for declaratory and injunctive relief only.

8. This Court has subject matter jurisdiction over the action pursuant to both 28 U.S.C. § 1331 and the judicial review provision of the 1996 Act, 47 U.S.C. § 252(e)(6). *See Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 804 n.24 (8th Cir. 1997) (State Commission contract enforcement decisions under 1996 Act reviewable in federal court), *cert. granted on other grounds*, 118 S. Ct. 879 (1998).

9. Venue is proper in this district pursuant to 28 U.S.C. § 1391. Venue is proper under § 1391(b)(1) because the Commissioner Defendants reside in this district. Venue is proper under § 1391(b)(2) because a substantial part of the events giving rise to this action occurred in this district, in which the PSC sits.

The 1996 Act

10. Prior to this decade, local telephone service was generally provided in Florida and in other states by a single, heavily regulated company like BellSouth that held an exclusive franchise to provide such service. Congress enacted the 1996 Act in order to replace this exclusive franchise system with competition for local service. *See* 47 U.S.C. §§ 251-253.

11. As Congress explained, the 1996 Act creates a "pro-competitive, de-regulatory" framework for the provision of telecommunications services. S. Conf. Rep. No. 104-230, at 113 (1996) ("Conference Report"). To achieve that goal, Congress not only preempted all

state and local exclusive franchise arrangements (47 U.S.C. § 253), but also placed certain affirmative duties on incumbent local exchange carriers such as BellSouth to assist new entrants in the local market.

12. One of those duties is relevant here. Under 47 U.S.C. §§ 251(c)(3) and 252(d)(1), BellSouth must allow new entrants to lease BellSouth's "network elements" at cost-based rates. A "network element" is defined by the 1996 Act as "a facility or equipment used in the provision of a telecommunications service" as well as "features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service." 47 U.S.C. § 153(29).

13. The FCC has concluded -- in a determination that the Supreme Court is currently reviewing -- that certain "operations support systems" (or "OSS") qualify as "network elements" under the 1996 Act.[1] OSS refers to the computerized ordering, billing, and other similar systems that BellSouth and other incumbents use to support the provision of local service. The FCC requires that BellSouth provide new entrants with access to OSS that

[1] *See* First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15766-67, ¶¶ 522-23 (1996), *aff'd in relevant part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (1997), *cert. granted*, 118 S. Ct. 879 (1998).

allows those entrants to perform OSS functions in substantially the same time and manner as BellSouth.[2]

14. The terms under which BellSouth must provide access to OSS (and to other aspects of its business) are determined in the first instance through voluntary negotiation between BellSouth and potential local entrants such as Supra. *See* 47 U.S.C. § 252(a).

15. In the event that BellSouth cannot reach agreement with an entrant on that issue (or any other question arising under the 1996 Act), either party may petition the appropriate state commission to arbitrate that issue in accordance with the terms of the 1996 Act. *See id.* § 252(b)(1). Additionally, after the parties have reached a full agreement -- as a result of either negotiation or arbitration -- the state commission must approve or reject that entire agreement based on whether it meets the criteria set out in sections 251 and 252. *Id.* § 252(e).

16. Any party aggrieved by a state commission determination has a statutory right to bring suit in a federal district court. *Id.* § 252(e)(6).

Prior Proceedings and the PSC Decision at Issue Here

17. In 1997 and early 1998, BellSouth and Defendant Supra reached two agreements regarding the terms under which Supra could obtain access to BellSouth's

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[2] Memorandum Opinion and Order, *Application of BellSouth Corp., BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, FCC 98-271, ¶ 87 (rel. Oct. 13, 1998).

network. Those Agreements track the obligations that the FCC has placed on BellSouth by generally requiring BellSouth to provide Supra with OSS functionalities that allow Supra to provide its customers with service equivalent to what BellSouth provides to its own end-users. These agreements were both approved by the PSC.

18. On January 23, 1998, Supra filed a Complaint and a Petition for Resolution of Disputes with the PSC alleging, among other things, that BellSouth had failed to implement certain aspects of its OSS obligations under the agreements in a way that allowed Supra to provide local exchange service on parity with BellSouth. Supra's complaint and petition did not identify the question of whether BellSouth had provided an "on-line edit checking capability" -- that is, the ability to check whether an order contains errors before that order is processed by BellSouth -- as a matter in dispute. The PSC held a hearing on Supra's claims on April 30, 1998.

19. On July 22, 1998, the PSC issued an order rejecting nearly all of Supra's specific claims against BellSouth. In particular, the PSC concluded that BellSouth had generally provided Supra with adequate access to BellSouth's OSS. In its order, however, the PSC also determined that "the same interaction and edit checking capability must take place when [a new local entrant] is working an order as when BellSouth's retail ordering systems interact with [certain BellSouth databases] to check the accuracy of BellSouth's orders." July 22, 1998 Order at 22.

20. BellSouth believed that the PSC's ruling on this on-line editing issue was both beyond the scope of this proceeding and substantively inconsistent with the requirements placed on BellSouth by the 1996 Act and the FCC's regulations. Accordingly, BellSouth sought reconsideration before the PSC.

21. In an order issued on October 28, 1998, the PSC denied BellSouth's reconsideration motion. A copy of the October 28 order is attached hereto as Exhibit "A" and incorporated herein by reference.

Claim for Relief

22. Paragraphs 1 through 21 are incorporated by reference as if set forth fully herein.

23. The PSC's decision to require BellSouth to provide Supra with on-line editing capability is not consistent with the 1996 Act, the FCC regulations implementing that Act, or the agreements between Supra and BellSouth. That is true because, among other things, on-line editing capability is not properly understood as a part of OSS and, even if it were a part of OSS, the requirement imposed by the PSC is not necessary to ensure that BellSouth provides Supra with adequate access to OSS.

24. The PSC's decision is also arbitrary and capricious, results from a failure to engage in reasoned decision-making, and is not supported by the record developed in the PSC proceedings.

RELIEF REQUESTED

WHEREFORE, as relief for the harms alleged herein, BellSouth as an aggrieved party requests that this Court:

a. declare that the PSC's and Commissioner Defendants' orders are invalid for the reasons discussed above.

b. grant BellSouth declaratory and injunctive relief to prevent all Defendants and anyone acting in concert with them from enforcing or attempting to enforce the PSC's orders to the extent that they require BellSouth to provide Supra with on-line editing capabilities;

c. grant such other relief as may be sought by BellSouth in further pleadings and as may be appropriate in this case.

Signed on this the 24th day of November, 1998.

ADORNO & ZEDER, P.A.

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DATE 12/11/98 *TIME* 11:08 A.M.

DELIVER TO Angel (Supra)

FROM Vickie Fatool (305) 347-5560

FAX # OR ONE TOUCH # OF RECIPIENTS(S) (305) 443-9516

NUMBER OF PAGES INCLUDING COVER SHEET 9

PERSON SENDING THIS FAX Vickie Fatool (305) 347-5560

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for emergency relief by Supra Telecommunications & Information Systems against BellSouth Telecommunications, Inc., concerning collocation and interconnection agreements.	DOCKET NO. 980800-TP ORDER NO. PSC-98-1417-PCO-TP ISSUED: October 22, 1998

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON
SUSAN F. CLARK
E. LEON JACOBS, JR.

ORDER ON LIMITED PROCEDURAL ISSUE REGARDING PRIORITY FOR PHYSICAL COLLOCATION

BY THE COMMISSION:

CASE BACKGROUND

On June 30, 1998, Supra Telecommunications & Information Systems (Supra) filed a Petition for Emergency Relief against BellSouth Telecommunications, Inc. (BellSouth). By its Petition, Supra asks that we require BellSouth to permit Supra to physically collocate in BellSouth's North Dade Golden Glades and West Palm Beach Gardens central offices. On July 20, 1998, BellSouth filed its Answer and Response to Supra's Petition. An administrative hearing on the merits of the Petition for Emergency Relief is scheduled for October 21, 1998.

Subsequent to Supra's Complaint, on August 7, 1998, BellSouth filed Petitions seeking waivers of the requirements of the Telecommunications Act of 1996 (Act), Section 251(c)(6), and paragraphs 602-607 of the Federal Communications Commission's First Report and Order to provide physical collocation. By its Petitions, BellSouth claims that it can no longer provide physical collocation in its West Palm Beach Gardens and North Dade Golden Glades central offices because it no longer has sufficient space.

BellSouth and Supra have a Collocation Agreement and Interconnection Agreement. The issues in the Complaint proceeding were narrowly tailored to address Supra's complaint as it arises out of the parties' agreement. Nevertheless, a unique priority issue arose affecting other ALECs who had requested space in these offices.

After reviewing the parties' direct testimony, and meeting with the parties to the Complaint docket, as well as intervenors in the waiver dockets, our staff realized that Supra was not the first company to request physical collocation in these two central offices. Supra was, however, the first company to file a complaint when BellSouth informed them that space was not available. Physical collocation is unique from other interconnection issues, because it involves a finite resource - space. Thus, if Supra is not the company that should have first priority for physical collocation in these central offices, the waiver requests should be dealt with before the Complaint proceeding is resolved. If Supra is the company that should have first priority in these offices, the Complaint proceeding should continue on its current track. Whether there is sufficient space for other companies would then be addressed through the waiver request dockets. Our staff asked that we address this issue before Supra's complaint progressed to hearing.

As with arbitration proceedings under the Telecommuncations Act of 1996, it is appropriate that contract complaint proceedings regarding contracts under the Act should be limited to the parties to the contract. See Docket No. 960833-TP for discussion in the following orders: Order No. PSC-96-0933-PCO-TP; Order No. PSC-98-0007-PCO-TP; Order No. PSC-98-0008-PCO-TP; Order No. PSC-98-0226-PCO-TP; Order No. PSC-98-0227-PCO-TP. In this unique situation, however, it appeared appropriate to allow the ALECs who requested physical collocation in the central offices in question to participate for the limited purpose of addressing the issue of whether or not Supra has first priority for physical collocation in these offices.

In order to address this question, an oral argument was held before us on September 22, 1998. The oral argument was limited to the following issue:

> In view of 47 C.F.R. § 51.323(f)(1), may Supra be considered to have first priority for physical collocation in BellSouth's Golden

> Glades and West Palm Beach Gardens central offices if the Commission determines, after hearing, that physical collocation is appropriate in these offices?

Participation in the oral argument did not constitute a grant of intervention in Docket No. 980800-TP.

This is our determination on the issue addressed at the September 22, 1998, oral argument.

ARGUMENTS

BellSouth

In its oral argument, BellSouth asserted that one ALEC requested space in the West Palm Beach Gardens central office prior to Supra, and two ALECs requested space in the North Dade Golden Glades central office before Supra requested space. BellSouth stated that it had denied physical collocation to these ALECs because it believes that there is no room available in these offices. BellSouth also indicated that it had obtained waivers from the physical collocation requirements from the FCC prior to the enactment of the Act. BellSouth added that these offices have not changed in size since it obtained the FCC waivers. BellSouth indicated that it believed that the ALECs that had been denied physical collocation in these offices had agreed to accept virtual collocation.

BellSouth asserted that Supra should not have priority over these other ALECs in either office. BellSouth stated that the FCC's First Report and Order clearly states that an incumbent local exchange company must provide space for physical collocation on a first-come, first-served basis. This requirement has been codified at 47 C.F.R. § 51.323(f)(1). BellSouth acknowledged that there is no discussion in the FCC's Order or Rules regarding the filing of a complaint and whether such a complaint would alter the first-come, first-served rule. BellSouth argued, however, that to allow such an outcome would open the "floodgate for complaints that are filed simply for the sake of ensuring that an ALEC is first at the courthouse steps." BellSouth further argued that the more rational approach would be to require BellSouth to allocate space starting with the first request received, if we determine that space is available. BellSouth stated that ". . . this appears to be the

only fair approach and the only approach that comports with the FCC and the Act." See Transcript of September 22, 1998, Oral Argument at p. 10.

Northpoint and e.spire

Northpoint and e.spire agreed with BellSouth. They argued that if we determine that space is available in the North Dade Golden Glades and West Palm Beach Gardens central offices, then the space should be filled based upon ". . . the priority established when the applications were filed." See Transcript of September 22, 1998, Oral Argument at p. 13. The companies contended that it is the application itself that establishes priority. According to Northpoint and e.spire, once an application has been filed, there is no further requirement for holding or improving your place in line. They added that if a carrier is told there is no space available, that carrier does not lose its place if the next carrier chooses to complain.

Northpoint and e.spire further asserted that if complaints become the standard for preserving an ALEC's place in line, then we will certainly see many more complaints filed with the Commission in the future regarding physical collocation. Northpoint and e.spire also questioned how we would handle multiple complaints filed regarding the same central office. These companies stated that we should apply the FCC's first-come, first-served rule in this and all instances.

Next Link

Next Link asserted that it was the first applicant for physical collocation in the North Dade Golden Glades central office and that it should have priority for space ahead of Supra. Next Link argued that 47 C.F.R. § 51.323(f)(1) is very clear how space must be allocated in the incumbent LEC's central offices. Next Link also argued that the proper forums for determinations regarding physical collocation in BellSouth's central offices are the waiver dockets, which have been opened to address BellSouth's petitions for waiver. Next Link asserted that Supra's complaint docket is duplicative and was filed in an attempt to bypass the first-come, first-served rule.

In addition, Next Link argued that neither it, nor any other ALEC that requested physical collocation ahead of Supra had waived their rights to physical collocation simply by not contesting

BellSouth's denial of their application. Next Link stated that the FCC rules require that BellSouth submit floor plans in order to demonstrate to the state commission that physical collocation is not feasible. Next Link noted that BellSouth has done so, and the proper forum for any further discussion of this matter is in the waiver dockets.

Supra

Supra stated that it does not contest what FCC Rule 47 C.F.R. § 51.323(f)(1) says. Supra argued, however, that by not pursuing the issue of physical collocation, the other ALECs forfeited their place in line. Supra argued that "The meaning of any provision of law in a statute or a rule is nothing if there is no opportunity for any person aggrieved under that statute to move to enforce that statute, and to go to the agency or entity that is responsible for enforcing it." See Transcript of September 22, 1998, Oral Argument at p. 20. Supra agreed that other ALECs had sought physical collocation in these central offices prior to Supra. Supra emphasized, however, that these ALECs did not recognize that Section 251(c)(6) of the Act required BellSouth to demonstrate to the state commission its basis for denying physical collocation.

Supra further asserted that if it had not filed its complaint, BellSouth may never have sought waivers for these offices from us. Supra argued that it has taken the time and expended the resources necessary to pursue physical collocation, rather than just accepting BellSouth's assertions that space is not available. Supra stated that no one else had assumed that task. Supra emphasized that we would not even have the issue of whether there is space available in these offices before it were it not for Supra's efforts. Supra argued that other ALECs had the same opportunity to assert their rights, but did not. Supra added that if we decide that Supra does not have priority, no other company will ever contest whether there is space in an office, because no company is ". . . going to apply its efforts and resources and money and blood, sweat and tears trying to get other companies into a central office." See Transcript of September 22, 1998, Oral Argument at p. 22. Supra further noted that the incumbent LEC would simply be able to deny physical collocation in a central office without being required to fully demonstrate the basis for the denial. Supra stated that if BellSouth is going to deny physical collocation, it should be prepared to support that denial in litigation.

DETERMINATION

As explained in the Case Background, this is a unique issue arising out of specific circumstances. BellSouth did not seek an exemption from the physical collocation requirements from the state commission when it denied requests for physical collocation, yet some ALECs that were denied physical collocation relied upon BellSouth's assertions that there was no space and that it had waivers from the FCC. Those ALECs that did not pursue the matter accepted virtual collocation as a substitute for physical collocation in these central offices. Supra was one of several ALECs denied physical collocation by BellSouth. Unlike the other ALECs that were denied physical collocation in these offices, Supra complained to us based upon the Act's requirements, and its own belief that space may be available in these offices. Supra actively pursued this issue in an effort to preserve any rights that it may have if space is later determined to be available.

The question that arises out of these facts is whether the FCC's first-come, first-served rule should be strictly applied in this instance, or whether Supra has priority in these offices because it complained. There are several provisions in the Act and the FCC's rules that have a bearing on this issue.

Section 251 of the Act imposes a number of duties and obligations upon incumbent LECs. Among those duties is the duty to provide for collocation. Section 251(c)(6) states

> COLLOCATION.- The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

The FCC has promulgated a number of rules implementing Section 251(c)(6) of the Act. Among them is FCC Rule 47 C.F.R. § 51.323(a), which states

> An incumbent LEC shall provide physical collocation to requesting telecommunications carriers.

FCC Rule 47 C.F.R. § 51.323(f)(1) also implements Section 251(c)(6). It states that

> (f) An incumbent LEC shall allocate space for the collocation of the equipment identified in paragraph (b) of this section in accordance with the following requirements:
>
> > (1) an incumbent LEC shall make space available within or on its premises to requesting telecommunications carriers on a first-come, first-served basis, provided, however, that the incumbent LEC shall not be required to lease or construct additional space to provide for physical collocation when existing space has been exhausted.

In addition, FCC Rule 47 C.F.R. § 51.321 (d-f) states

> (d) An incumbent LEC that denies a request for a particular method of obtaining interconnection or access to unbundled network elements on the incumbent LEC's network must prove to the state commission that the requested method of obtaining interconnection or access to unbundled network elements at that point is not technically feasible.
>
> (e) An incumbent LEC shall not be required to provide for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the incumbent LEC's premises if it demonstrates to the state commission that physical collocation is not practical for technical reasons or because of space limitations. In such cases, the incumbent LEC shall be required to provide virtual collocation, except at points where

> the incumbent LEC proves to the state commission that virtual collocation is not technically feasible. If virtual collocation is not technically feasible, the incumbent LEC shall provide other methods of interconnection and access to unbundled network elements to the extent technically feasible.
>
> (f) An incumbent LEC shall submit to the state commission detailed floor plans or diagrams of any premises where the incumbent LEC claims that physical collocation is not practical because of space limitations.

We have reviewed these provisions carefully. We have also reviewed the collocation provisions of the FCC's *First Report and Order*, Order 96-325, and the FCC's *Memorandum Opinion and Order on Expanded Interconnection*, Order 94-190. Our review of these provisions and consideration of the arguments presented confirms our belief that the situation that has arisen in this case is unique and one not contemplated by the FCC's Rule 47 C.F.R. § 51.323(f)(1), the "first-come, first-served" rule.

As set forth in Paragraph 72 of FCC Order 94-190, the FCC has determined that ". . . a first-come, first-served process appears to be the most equitable manner to allocate space." The FCC has advocated this policy for some time. As set forth at Paragraph 67 of FCC Order 94-190,

> Orders/Background. Our existing rules require the LECs to offer space for physical collocation on a first-come, first-served basis, and to provide virtual collocation in central offices in which space for physical collocation is unavailable or becomes exhausted.

The FCC has been clear that when a LEC is no longer able to allocate any space for physical collocation, the LEC must seek an exemption or waiver of the physical collocation requirements. If the exemption is granted, the LEC must provide virtual collocation. The FCC has further indicated that when the LECs petition for exemptions due to space limitations, they should provide detailed information regarding central office space availability, in many cases including floor plans and statements regarding future plans.

FCC Order 94-190 at ¶ 71. The FCC noted that it found that this process worked well. Id. The passage of the 1996 Act did not change the FCC's stance on first-come, first-served for physical collocation, and it still clearly contemplates that the LECs will seek a waiver if physical collocation is no longer feasible. See FCC Order 96-325 at ¶585, Rules 47 C.F.R. § 51.321(d) and § 51.321 (f).

In addition, the FCC has recognized the state commission's role in the reviewing whether physical collocation is feasible, in accordance with the Act. In particular, Rule 47 C.F.R. § 51.321(d) clearly states that when a LEC denies a request for any method of interconnection or access to unbundled network elements, the LEC must demonstrate to the state commission that the method is not feasible. See also FCC Order 96-325 at ¶ 585.

There are, however, no statements in the FCC's First Report and Order or the FCC's Rules regarding remedies or consequences if a LEC does not seek an exemption. In view of the extent to which the FCC has addressed the matter of exemptions from the physical collocation requirements, we consider this is an indication that the FCC did not contemplate this situation in which a LEC denied physical collocation without a valid waiver, the first ALECs denied space did not complain, but a subsequent applicant did complain. Since it does not appear that the FCC contemplated this particular situation, we find that strict application of the FCC's first-come, first-served rule would be unreasonable in this instance.

We will not speculate as to when BellSouth would have sought waivers for the North Dade Golden Glades and West Palm Beach Gardens central offices if Supra had not complained. It is, however, noteworthy that Next Link indicated that it had been denied physical collocation in April, 1998. Supra's complaint was filed June 30, 1998. BellSouth did not file its petitions for waivers for these offices until August 7, 1998. It is sufficient that Supra brought this situation to our attention first. The other ALECs that were denied physical collocation in these offices had the same rights under the Act as Supra and the same opportunity to seek relief when BellSouth denied their requests for physical collocation. They did not pursue the issue and entered into negotiations for virtual collocation.

Based upon these specific circumstances, we find that it would contradict fundamental principles of fairness to subjugate Supra's right, if any, to physical collocation in BellSouth's West Palm

Beach Gardens and North Dade Golden Glades central offices to the rights of other ALECs that did not actively pursue the issue. While we do not wish to encourage "races to the courthouse" or litigious behavior, as some ALECs have suggested, we do believe that it is important for problems to be brought to our attention in a timely manner. We emphasize that we consider Supra to have priority in only in the North Dade Golden Glades and West Palm Beach Gardens offices, and only because Supra filed its complaint after BellSouth denied Supra physical collocation in these offices, well before BellSouth had filed its waiver requests for these offices with us, and before any other ALEC had complained. We consider our determination that Supra has priority in these offices to be specific to this complaint proceeding. Our decision herein does not alter Supra's position as it applies to other central offices or to separate proceedings regarding the North Dade Golden Glades and West Palm Beach Gardens central offices.

Supra's complaint brought to our attention the fact that BellSouth had been denying physical collocation without a waiver from the state commission. Now that BellSouth has recognized that it must seek waivers from this Commission, we believe that this particular situation will not arise in the future. If it does, it would certainly be appropriate to address it through a complaint proceeding, if necessary. We emphasize, however, that filing a complaint should not be viewed as a means for an ALEC to preserve its place in line in other situations. Only the timing and circumstances at work in this case constitute a basis for avoiding strict application of the first-come, first-served rule, because without Supra's complaint, we might not even be addressing the issue of whether there is space for physical collocation in these offices.

We note that, on a going-forward basis, we expect that space and technical feasibility issues related to physical collocation will be addressed in waiver proceedings. We strongly encourage BellSouth to reassess the space in a central office after it has filled a request for physical collocation. If there is not room for further physical collocation, BellSouth should petition us for a waiver from the physical collocation requirements before it receives any more requests for physical collocation in that office.

Finally, we acknowledge concerns that were raised regarding the impact our decision giving Supra priority in these offices could have in a situation in which BellSouth had a valid waiver for a central office, but due to technical advancements or building

its facilities. The FCC states, in part, that

> Consistent with the requirements and findings of the *Expanded Interconnection* proceeding, we conclude that incumbent LECs should be required to take collocator demand into account when renovating existing facilities and constructing or leasing new facilities, just as they consider demand for other services when undertaking such projects. We find that this requirement is necessary in order to ensure that sufficient collocation space will be available in the future. We decline, however, to adopt a general rule requiring LECs to file reports on the status and planned increase and use of space. State commissions will determine whether sufficient space is available for physical collocation, and we conclude that they have authority under the 1996 Act to require incumbent LECs to file such reports. We expect individual state commissions to determine whether the filing of such reportS is warranted.

FCC Order 96-325 at ¶ 585. This issue may be further addressed in the proceedings on BellSouth's pending waiver petitions.

Based on the foregoing, it is therefore

ORDERED by the Florida Public Service Commission that Supra Telecommunications & Information Systems shall be considered to have first priority for physical collocation in BellSouth's North Dade Golden Glades and West Palm Beach central offices, if we find, after hearing in this Docket, that physical collocation is appropriate in these offices. It is further

ORDERED that this Docket shall remain open pending the outcome of the October 21, 1998, hearing.

additions, space became available at a later date. Again, we emphasize that we believe that the FCC did not contemplate the specific facts of this case, and, therefore, the deviation from the FCC's first-come, first-served rule in this case is warranted. The FCC has, however, considered situations in which a LEC renovates

By ORDER of the Florida Public Service Commission this 22nd day of October, 1998.

/s/ Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

This is a facsimile copy. A signed copy of the order may be obtained by calling 1-850-413-6770.

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial

review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.